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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 984

JAMES RAY LOVE,
Petitioner.

vs.

JOHN TAYLOR, ROSALIE TAYLOR, WILLIE MAE SUGGS, VIRGIL SUGGS, and EMMA GRIFFIN,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PLUNKETT, COONEY, RUTT & PEACOCK
ROBERT E. PLUNKETT
JEANNETTE A. PASKIN
Of Counsel
Attorneys for Petitioner
1000 Guardian Building
Detroit, Michigan 48226
965-3900

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on September 23, 1969.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan announced on July 19, 1968

has not yet been reported. The opinion of the United States Court of Appeals for the Sixth Circuit entered on September 23, 1969 has not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on September 23, 1969 and a copy thereof is appended to this petition in the Appendix at page 13.

The jurisdiction of this court is invoked under 28 USC, §1254(1).

QUESTIONS PRESENTED

Plaintiffs commenced suit in the United States District Court for the Eastern District of Michigan, Southern Division, alleging personal injuries and property damage resulting from an automobile accident occurring in Tennessee on or about December 31, 1966, allegedly caused by defendant's negligence. Defendant is an individual and not a corporation. Defendant is a resident of Tennessee. The accident occurred in Tennessee. The defendant has no contact with the State of Michigan. Plaintiff has been, at all times, fully aware of these facts prior to the commencement of the action and alleges same in his complaint.

Defendant moved to dismiss the Complaint on the grounds that the Court had no personal jurisdiction over the defendant. Defendant could not be effectively served under the Federal Rules of Civil Procedure, 4(e), 4(f) and, Michigan General Court Rules 1963, 105.9 and Michigan Revised Judicature Act of 1961, Michigan Compiled Law 1948, §600.705, (Michigan Statutes Annotated, 1962

Rev. §27A.705), these sections providing the local bases for the jurisdiction and methods for service of process.

The Trial Court found that it lacked personal jurisdiction over the defendant, and granted defendant's Motion to Quash Service of Process. Plaintiff's Motion to Transfer Venue to the District Court in Tennessee pursuant to 28 United States Code, §1404(a) and §1406(a) was granted. Leave to Appeal to the Court of Appeals, Sixth Circuit, was sought under 28 USC, §1292(b) and granted. The Court of Appeals affirmed the Order of the Trial Court.

The decision of the Court of Appeals was based on the Opinion written by this Court in *Goldlawr v. Heiman*, (1962) 369 US 463, 8 L Ed. 2d 39, 82 S. Ct. 913. Although the Opinion acknowledges that the fact situation involved in the instant case differs from that of the *Goldlawr* case, *supra*, and the suit may well have been filed in the United States District Court in Michigan just to stop the running of the statute of limitations in Tennessee, it was decided by the Court of Appeals that the language quoted from Mr. Justice Black's Opinion in *Goldlawr, supra*, seems to describe the congressional intent in adopting §1406(a), as not excluding such a purpose. The court also found that this appears to be true, although venue in Michigan is "wrong" only because of lack of personal service on defendant.

The questions presented are:

I. Does the Federal District Court sitting in the State of Michigan have jurisdiction over the person of a defendant who is a citizen and resident of the State of Tennessee, and who was served with a Summons and Complaint in the State of Tennessee, and the cause of action arose in the State of Tennessee?

II. Does the Federal District Court have the power to transfer a cause of action to another District under the provisions of 28 USC, §1404(a) and 1406(a) when the Court lacks personal jurisdiction over the defendant?

III. Do the provisions of 28 USC §1404(a) and 1406(a) apply in an instance where proper venue was obviously known to plaintiff who purposely chose to file suit in a District Court of Michigan, wherein personal jurisdiction could not be obtained over defendant, merely to toll the Statute of Limitations?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

Federal Rules of Civil Procedure 4(e)

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Federal Rules of Civil Procedure 4(f)

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be seved within the territorial limits provided in Rule 45.

Michigan GCR (1963) 105.9

Service of a summons and a copy of the complaint, as hereinbefore provided, shall confer personal jurisdiction over a defendant having any of the contacts, ties, or relations with this state as specified in RJA Chapter 7, by giving notice to the defendant of the pendency of the action and an opportunity to defend. There is no territorial limitations on the range of the service of such notice.

Michigan Statutes Annotated, Sec. 27A.5856

The statutes of limitations are tolled when

(1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when

(2) jurisdiction over the defendant is otherwise acquired, or when

(3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter.

Michigan Revised Judicature Act, Sec. 701

The existence of any of the following relationships between an individual and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over such individual or his representative and to enable such court to render personal judgments against such individual or representative.

(1) Presence in the state at the time when process is served.

(2) Domicile in the state at the time when process is served.

(3) Consent, to the extent authorized by the consent.

Michigan Revised Judicature Act, Sec. 705

The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such individual and to enable such courts to render personal judgments against such individual or his representative arising out of the act or acts which create any of the following relationship:

(1) The transaction of any business within the state.

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

(3) The ownership, use, or possession of any real, or tangible personal property situated within the state.

(4) Contracting to insure any person, property, or risk located within this state at the time of contracting.

28 USC, Sec. 1404

(a)

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 USC, Sec. 1406

(a)

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

STATEMENT

Plaintiffs allege against the defendant, petitioner herein, personal injuries and property damage resulting from an automobile accident in Tennessee on or about December 31, 1966, allegedly caused by the defendant's negligence. The basic facts, which are not in dispute, are as follows:

Defendant is an individual and not a corporation. Defendant is a resident of Tennessee. The accident occurred in Tennessee. The defendant had and has no contact with the State of Michigan. Plaintiff has been at all times fully aware of these facts prior to the commencement of the action and alleges same in his Complaint.

Following the institution of the suit, petitioner moved to quash service of process and dismiss the lawsuit.

On July 19, 1968, Judge Roth granted petitioner's Motion to Quash Service, but petitioner's Motion to Dismiss was denied. Respondent's Motion to Transfer was granted. The Trial Court relied upon *Goldlawr, Inc. v. Heiman,* 369 US 463, 8 L Ed 2d 39, 82 S. Ct. 913 (1962) and *Mayo Clinic v. Kaiser,* 383 Fed 2d 653 (CA 8 1967).

The Court of Appeals, hearing the matter as an interlocutory appeal from an Order entered by District Judge Roth, affirmed. The Court held that the *Goldlawr* decision, *supra*, completely disposed of appellant's first argument as to jurisdiction. It was held that the United States District Court in Michigan had jurisdiction of this Complaint, although not of the person of the defendant. It also had the power under §1406(a) to transfer the Complaint. (Opinion of Court p. 3.)

The Eighth Circuit in *Mayo Clinic v. Kaiser,* 383 F 2d 653 (CA 8 1967) and the Fifth Circuit in *Dubin v. United States,* 380 F 2d 813 (CA 5 1967), have held that jurisdiction exists with a District Judge to transfer a Complaint, even though personal jurisdiction over the defendant is lacking. A differing opinion appears in *Skilling v. Funk Aircraft Co.,* 173 Fed. Supp. 939 (WD Mo. 1959).

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it erroneously interprets 28 USC §§1404 (a) and 1406(a), and the decision of this Court in *Goldlawr, Inc. v. Heiman,* 369 US 463, 8 L Ed 2d 39, 82 S Ct 913 (1962). The decision of the Sixth Circuit Court of Appeals now makes it possible for a plaintiff to commence an action in any federal

jurisdiction with the consequence that a defendant is subjected to the necessity of acquiring nationwide legal representation.

2. If a Maine resident is sued by an Hawaiian resident he must bear the burden of legal expense to quash service of process, assuming no contacts with the forum state, or take a chance that a default judgment is not entered against him. There is no technical injustice or "justice-defeating technicalities" in a case such as the instant matter where a plaintiff is fully cognizant of the fact that he cannot obtain service of process on the defendant. The Court of Appeals decided the case at bar on the basis of the *Goldlawr* opinion rendered by this Court. The far reaching consequences of that Opinion should be reviewed and the matter decided in the light of the facts presented in this appeal. In each of the cases decided, subsequent to the *Goldlawr* decision, *supra,* the defendant had some contact or some connection with the jurisdiction in which the cause of action was commenced. The *Goldlawr* decision itself involves a violation of the antitrust statutes. Matters of venue and transfer are distinguishable in that case from the facts in the instant case.

3. The ultimate question is presented in this petition. This Court must decide if a plaintiff is to have nationwide access to a defendant. It is clear that when a court states as it did herein that it has no jurisdiction over a person but does have jurisdiction over the complaint, the practical effect of a transfer order is to exercise jurisdiction over the person. If a person such as defendant herein, is bound by the transfer order, jurisdiction over his person has been exercised.

4. The plaintiff has not tolled the statute of limitations under the laws of Tennessee or under the laws of Michigan. Cite: Michigan Compiled Law 1948 §600.5856, Mich. Stat. Ann. Tennessee Civil Procedure, §§20-201 *et seq.* The

act of the federal court in transferring the action to a court in Tennesssee vitiates the defenses available to the defendant as a citizen and resident of Tennessee. By federal court order, defendant can be served and must defend long after the statute of limitations has run. Jurisdiction over the person has been exercised even though the Court of Appeals claims it has no jurisdiction over the person but does have jurisdiction over the complaint.

5. The question must be answered:

Does a federal court obtain jurisdiction over a defendant by the plaintiff's act in filing a Complaint with the court?

There is no doubt jurisdiction over the defendant's person was not obtained by service of process. Yet, defendant is bound by the order of the federal court in Michigan to transfer venue to the appropriate court in Tennessee.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PLUNKETT, COONEY, RUTT & PEACOCK
ROBERT E. PLUNKETT
JEANETTE A. PASKIN
Of Counsel
Attorneys for Petitioner
1000 Guardian Building
Detroit, Michigan 48226
965-3900

APPENDIX

RULINGS ON MOTION TO QUASH SERVICE AND TO DISMISS AND MOTION TO TRANSFER CASE

(Filed June 7, 1968)

This is a civil action for money damages arising from an automobile accident which occurred in Tazewell, Tennessee, about December 21, 1966. The plaintiffs are all citizens of Michigan, and the defendant is a citizen of Tennessee. Suit was filed in the Eastern District of Michigan on December 20, 1967.

It appears that at no time has the defendant resided in Michigan. Since he was personally served in Tennessee, this Court lacks personal jurisdiction over the defendant.

The plaintiffs have moved that the case be transferred to the Federal District Court of Tennessee, pursuant to Title 28, U.S.C., Sections 1404(a) and 1406(a). The defendant objects to the transfer on the grounds that the venue, as such, is proper in Michigan and that this Court cannot transfer a case over which it does not have personal jurisdiction of the defendant. Defendant's arguments have been previously considered and have not been adopted as the law. *Goldlawr v. Heiman,* 369 U.S. 463, 8 L. Ed. 2d 39, 82 S. Ct. 913 (1962), *Kaiser v. Mayo Clinic,* 260 F. Supp. 900 (Minn. 1966), affirmed, *Mayo Clinic v. Kaiser,* 383 F. 2d 653 (Eighth Cir. 1967).

Defendant's motion to quash is granted, but the motion to dismiss is denied. The plaintiff's motion to transfer is granted. Appropriate orders may be submitted.

Stephen J. Roth,
United States District Judge.

Dated: June 7, 1968.

ORDER GRANTING MOTION TO QUASH SERVICE, DENYING MOTION TO DISMISS AND GRANTING A STAY OF PROCEEDINGS

At a session of the said Court, held in the Federal Building, Detroit 26, Michigan, on July 19, 1968.

Present: Honorable Stephen J. Roth.

This cause having come on to be heard on Defendant's Motion to Quash Service of process in this cause and to dismiss the Complaint as to the defendant, James Ray Love, and the Court having heard the argument of counsel and being fully advised in the premises:

Now, therefore, it is hereby ordered that defendant's Motion to Quash Service be and the same is hereby granted; but defendant's Motion to Dismiss be and the same is hereby denied.

The undersigned expressly determines that there is no just reason for delay in entering a final judgment on Defendant's Motion to Quash Service and Motion to Dismiss; and

It is further ordered that final Judgment be entered on defendant's Motion to Quash Service of Process in favor of the defendant, James Ray Love, and

It is further ordered that a Final Judgment be entered on defendant's Motion to Dismiss in favor of the plaintiffs, John Taylor, et al, and that plaintiffs' Motion to Transfer is hereby granted.

The undersigned is of the opinion that this Order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an im-

mediate appeal from this Order is authorized by 28 U.S. C.A., Section 1292(b) and may materially advance the ultimate determination of this litigation.

It is further ordered that all proceedings herein be stayed for ten (10) days from the date of the entry of this Order. If, within such ten (10) days, the defendant shall apply to the United States Court of Appeals for the Sixth Circuit, for permission to appeal from this Order, the proceedings herein shall be stayed pending a determination of such application or the appeal, if it is allowed.

Stephen J. Roth,
District Judge.

JUDGMENT OF THE COURT OF APPEALS

No. 19049

United States Court of Appeals for the Sixth Circuit

(Filed September 23, 1969)

John Taylor, Rosalie Taylor, Willie Mae Suggs, Virgil Suggs, and Emma Griffen, *Plaintiffs-Appellees,* v. James Ray Love, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided September 23, 1969

Before: O'Sullivan, Phillips and Edwards, Circuit Judges.

Edwards, Circuit Judge. This is an interlocutory appeal from an order entered by District Judge Roth transferring

a diversity case which had been filed in the Eastern District of Michigan to the appropriate United States District Court in Tennessee.

Plaintiffs are Michigan residents who claimed they were injured as a result of defendant's negligence in an automobile accident which occurred in Tazewell, Tennessee. After the filing of this suit in Michigan, a District Judge in the United States District Court for the Eastern District of Michigan granted defendant's motion to quash service of process on him in Tennessee. But he also denied defendant's motion to dismiss and granted plaintiffs' motion to transfer. He relied in this regard upon *Goldlawr, Inc. v. Heiman,* 369 U.S. 463 (1962), and *Mayo Clinic v. Kaiser,* 383 F. 2d 653 (8th Cir. 1967). The District Judge then certified that his order involved a controlling question of law and this court granted defendant's application for leave to appeal.

The controlling federal statute, 28 U.S.C. § 1406(a) (1964) reads as follows:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

The purpose of this amendment has been interpreted by the United States Supreme Court in *Goldlawr v. Heiman, supra.*[1] Mr. Justice Black in the opinion for the Court held that lack of personal jurisdiction over a defendant did not

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[1] The *Goldlawr* decision has been the subject of a number of Law Review case notes which bear upon our current controversy: 61 Mich L. Rev. 393 (1962); 32 Cin. L. Rev. 257 (1963); 1963 Duke L.J. 168 (1963).

deprive the court of jurisdiction so as to prevent transfer to the appropriate District Court under § 1406. The opinion said in part:

> "Nothing in that language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. And we cannot agree that such a restrictive interpretation can be supported by its legislative history — either that relied upon by the Court of Appeals or any other that has been brought to our attention.
>
> * * *
>
> "The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as "time-consuming and

> justice-defeating technicalities. It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-467 (1962). (Footnotes omitted.)

It seems clear to use that *Goldlawr* completely disposes of appellant's first argument as to jurisdiction. The United States District Court in Michigan had jurisdiction of this complaint, although not of the person of defendant. It also had the power under § 1406(a) to transfer the complaint.

We recognize, of course, that the *Goldlawr* case did not deal with the same fact situation we face here. On the instant record, where the accident is alleged to have occurred in Tennesee and the Judge's opinion says that defendant had never lived in Michigan, we would have to assume that as appellant contends, this suit may well have been filed in the United States District Court in Michigan just to stop the running of the statute of limitations in Tennessee. But the language we have quoted from Mr. Justice Black's opinion in *Goldlawr* seems to describe the congressional intent in adopting § 1406(a) as not excluding such a purpose. And this appears to be true, although venue in Michigan is "wrong" only because of lack of personal service on defendant.

Two Courts of Appeals have squarely held with the District Judge and the appellees on facts which in all important respects are identical. They are the Eighth Circuit in *Mayo Clinic v. Kaiser*, 383 F. 2d 653 (8th Cir. 1967), and the Fifth Circuit in *Dubin v. United States*, 380 F. 2d 813 (5th Cir. 1967). In the *Dubin* case, the Fifth Circuit said:

> "Looking to the language of § 1406, the statute is couched in terms of 'laying venue in the wrong division or district.' The statute does not refer to 'wrong' venue, but rather to venue laid in a 'wrong division or district.' We conclude that a district is 'wrong' within the meaning of § 1406 whenever there exists an 'obstacle [to] . . . an expeditious and orderly adjudication' on the merits. Inability to perfect service of process on a defendant in an otherwise correct venue is such an obstacle." *Dubin v. United States, supra* at 815.

Arguments in favor of the appellant's position are set forth effectively in the dissenting opinion of Mr. Justice Harlan in *Goldlawr* and in a United States District Court opinion, *Skilling v. Funk Aircraft Co.*, 173 F. Supp. 939 (W.D. Mo. 1959). The footnote on page 468 of the *Goldlawr* case is particularly noted. But of course, it spoke only for two members of the Court.

The Supreme Court in *Goldlawr* held that congressional intent in adopting § 1406(a) included a recognition that "the interest of justice" may require the transfer of a complaint so that a plaintiff would not be penalized by "justice-defeating technicalities." *Goldlawr, Inc. v. Heiman, supra* at 467.

Obviously, the District Judge in this case felt it was in "the interest of justice" to effect the transfer. We find no fact presented and no principle of law argued to us to convince us of any abuse of discretion on the part of the District Court.

The judgment of the District Court is affirmed.